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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 910.

PETER DOYLE, SECRETARY OF STATE OF THE STATE OF WISCONSIN, APPELLANT,

vs.

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED NOVEMBER 1, 1876.

June 27 1877
Dismissed

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1 Circuit court of the United States of America, for the western district of Wisconsin.

UNITED STATES OF AMERICA.
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law at the city of La Crosse, in said district, on the third Tuesday (being the 19th day) of September, A. D. 1876, present and presiding the Hon. James C. Hopkins, district judge, among other, the following proceedings were had, to wit:

THE CONTINENTAL INSURANCE COMPANY OF the city of New York
vs.
PETER DOYLE, SECRETARY OF STATE OF THE State of Wisconsin.
} In equity.

Be it remembered that heretofore, to wit, on the 28th day of September, A. D. 1875, came the above-named complainant, by Messrs. Finches, Lynde, and Miller, its solicitors, and filed its bill herein as follows, to wit:

Bill.

Circuit court of the United States for the western district of Wisconsin, in the seventh circuit.

To the judges of the circuit court of the United States for the western district of Wisconsin:

2 The Continental Insurance Company of the city of New York, a corporation duly created, organized, and existing under and by virtue of the laws of the State of Connecticut, and a citizen of the State of Connecticut, brings this its bill against Peter Doyle, secretary of state of the State of Wisconsin, and a citizen of the State of Wisconsin, and thereupon your orator complains, and says that prior to the passage of the act of the legislature of the State of Wisconsin entitled "An act to provide for the incorporation and government of fire and inland navigation insurance companies," approved March 4th, 1870, your orator had established agencies, opened offices, and made considerable expenditures of money in advertising the business of insurance against loss or damage by fire in the said State of Wisconsin, and was conducting a somewhat extensive business in said last-mentioned State; that soon after the passage of the said last-mentioned act of the legislature, your orator fully complied with the provisions of section twenty-two of said act, and did procure from the State treasurer and secretary of state of said State of Wisconsin, the certificates, and license and authority to prosecute business in the said State, as therein provided, to be issued by said last-mentioned State officers respectively, so that under the said act your orator was entitled to, and did from thence hitherto continue to conduct and transact its said insurance business in said State of Wisconsin; and that your orator did, soon after the first day of January, and within thirty days thereafter, in each year, file the statement and do all the other acts required by the said section twenty-two, to entitle it under the said act to do and continue business in said State, but
3 that upon filing the appointment of an agent upon whom process

of law could be served, your orator was compelled to add to the agreement that your orator would not remove suits brought against in the courts of the State of Wisconsin into the Federal courts, and a clause to that effect was inserted in the said agreement of your orator, and made part thereof.

And your orator alleges that heretofore, to wit, prior to the filing of this, your orator's bill, the Supreme Court of the United States, in the case of the Home Insurance Company against John F. Paige and Charles C. Paige, declared so much of the said act of the legislature of the State of Wisconsin as compelled the signing of the said agreement not to remove causes from the courts of the State of Wisconsin into Federal courts, to be unconstitutional, illegal, and void, and that the said clause in said agreement to that effect was illegal, null, and void, as by reference to said decision in said cause as reported in the 20th volume of Wallace Reports, pages 445 to 458, will more fully appear, and to which said decision your orator prays leave to refer.

And your orator alleges that after the said decision of the Supreme Court of the United States was made, holding and deciding said portion of said law and said clause in said agreement illegal, null, and void, to wit, on or about the tenth day of March, 1875, one A. J. Drake, a citizen of Wisconsin, commenced a suit in the circuit court of Winnebago County, State of Wisconsin, against your orator, to recover damages alleged to have been sustained by him by the destruction by fire of certain property insured by him in your orator's company; that your orator duly appeared in said suit, and at the time of appearing
4 therein, duly filed its petition and duly tendered a bond asking that all proceedings in said cause might be stayed, that the security tendered might be accepted, and that said cause might be removed into the circuit court of the United States for the eastern district of Wisconsin, that court being the proper Federal court to take jurisdiction of said cause.

And your orator alleges that said petition was filed at the proper time and contained all the necessary facts required to be alleged to authorize a removal of said cause under the laws of Congress; that the said bond was in all respects in strict and full compliance with said laws of Congress, and such proceedings were had in the said cause in the said circuit court of Winnebago County; that the security tendered was accepted and all proceedings in said cause were stayed, and the said cause was removed into the said United States circuit court in and for the eastern district of Wisconsin, and was afterwards, and on or about the 21st day of April, 1875, duly docketed in said last-named court, and while said suit was pending in said last-named court, the said suit was settled by agreement between the parties.

And your orator alleges that after said suit was removed as hereinbefore stated from the said circuit court of Winnebago County, upon the application of your orator, into the said circuit court of the United States, in and for the eastern district of Wisconsin, the said A. J. Drake, or some one acting for and on his behalf, or by his request or consent, sent or caused to be sent to said defendant, Peter Doyle, a copy of the record of said action as the same remained of record
5 in the office of the circuit court of Winnebago County, showing the removal of the said suit from said court to the said circuit court of the United States, and as your orator is informed and believes, and so alleges the fact to be, demanded of said defendant that he, as the secretary of state of the State of Wisconsin, should at once, and without a trial or hearing, revoke the certificate and license theretofore

granted to your orator to do business in the State of Wisconsin, and withdraw from your orator all authority to transact business in the said State of Wisconsin, in accordance with the provisions of chapter 64, laws of 1872, being an act of the legislature of the State of Wisconsin, entitled "An act to provide for the enforcement of the laws in certain cases," approved March 16, 1872. And your orator alleges that it is claimed and insisted that, under and by virtue of the said last-mentioned act, the said defendant may summarily, without notice or trial, upon the fact being brought to his knowledge that an application has been made to remove a cause brought in the courts of Wisconsin into the Federal courts, revoke, cancel, and annul the certificate or license granted to such insurance company applying for and obtaining such removal.

And your orator alleges it is fearful the said defendant will act under and in accordance with the provisions of the said last-mentioned act, and will revoke, cancel, and annul the certificate and license given to your orator to do business in the State of Wisconsin, simply and only for the reason that your orator applied for and obtained the removal of the said cause from the circuit court to the said circuit court of
6 the United States, unless he is restrained and enjoined from so doing by the order of this honorable court.

And your orator is informed and believes that the said A. J. Drake, or those who are acting for him, or on his behalf, or using his name to accomplish their purposes, have given out and threatened that if the said defendant does not revoke, annul, and cancel said certificate and license given to your orator to do business in the State of Wisconsin, that they will compel him to do so by proofs of some kind from the courts of the State of Wisconsin, and your orators are fearful that under the pressure of such threats said defendant may or will revoke, annul, and cancel such certificate and license, unless restrained from so doing.

And your orator alleges that said last-named act of the legislature is illegal, null, and void, and is in conflict with the laws and Constitution of the United States.

And your orator alleges that it has officers in various towns, cities, and villages in the State of Wisconsin, and has a large number of agents in said State engaged in and about its business of obtaining and insuring property against loss or damage by fire, and if the said defendant should now revoke the said certificate and license granted to your orator to do business in the State of Wisconsin, it would destroy the business of your orator in the said State of Wisconsin, and would do great and irreparable damage and injury to the business of your orator in said State.

And your orator alleges that it has now a large and lucrative business in the said State of Wisconsin, and that, in the course of its business, it does happen that unjust and claims are made against your
7 orator, and that in such cases your orator is obliged to defend such actions, and that it will be as necessary in the future as in the past, that when suits are instituted against your orator, it should have the right to make the proper application, at the proper time and in a proper and legal manner, in a proper and legal case, to remove the same from a State court to the United States court within the State of Wisconsin, without the constant threat or peril of having its certificate and license to do business in the State of Wisconsin revoked, annulled, or cancelled for that reason.

And your orator alleges that it has no adequate remedy at law for

recovery of damages in case of a revocation or annulment of its certificate and license to do business in the State of Wisconsin, and that the only adequate remedy of your orator is an injunction restraining the said defendant from revoking or attempting to revoke, cancel, or annul said certificate and license to your orator.

May it please your honors to grant unto your orator the writ of injunction issuing out of and under the seal of this honorable court, or issued by your honors according to the form of the statute in such case made and provided, directed to said defendant, Peter Doyle, secretary of state, as aforesaid, and to his agents, servants, clerks, attorneys, employees, and successor or successors in office, enjoining and restraining them and each and all of them from in any case or upon any pretense revoking any certificate or license granted to your orator authorizing it to do business in the said State of Wisconsin, and from publishing, or causing to be published in any form, any notice of any such revocation, because or on account of the removal or attempt to remove any cause heretofore brought, or which may hereafter be brought,
8 in any court of the State of Wisconsin into the United States circuit court in and for the State of Wisconsin, and that the said provision of said section twenty-two of the aforesaid act of the legislature of the State of Wisconsin, so far as the same requires your orator to make or file an agreement not to remove any suit commenced in the courts of Wisconsin into the United States courts, and the agreement filed by your orator under said law to that effect, may be declared illegal, null, and void; that the said chapter 64, of the laws of 1862, may be declared illegal, null, and void, and that your orator may have such other, further, and different relief as this honorable court may grant in the premises.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Peter Doyle, secretary of state of the State of Wisconsin, commanding him on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to and perform and abide such further order, direction, and decree as may be made against him.

And your orator, as in duty bound, will ever pray, etc.

FINCHES, LYNDE & MILLER,
Solicitors for Complainant.

H. M. FINCH,
Of Counsel.

WESTERN DISTRICT OF WISCONSIN, *ss:*

H. M. Finch, being duly sworn, says that he is one of the solic-
9 itors of the said complainant, and makes this affidavit for and on behalf of said complainant; that he has read the foregoing bill and knows its contents; that the same is true of his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes it to be true; that the reason this deponent makes this verification is that the general agent of said complainant is not within the western district of Wisconsin, and none of the officers or directors of said complainant are within said district to the knowledge of this deponent, and further deponent saith not.

H. M. FINCH.

Subscribed and sworn to before me this 28th day of September, 1875.

W. A. P. MORRIS,
U. S. Court Comr. Wsn. Dist. of Wis.

Whereupon a subpœna issued returnable the first Monday of November, 1875, as follows to wit:

Subpœna.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to Peter Doyle, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the western district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of November next ensuing, at Madison, to answer to a bill of complaint exhibited against you in our said court by the Continental Insurance Company of the city of New York, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Peter Doyle, if he be found in this district, and due return thereof made.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Madison, in the said district, this 28th day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth.

[SEAL.] F. M. STEWART,
Clerk.

FINCHES, LYNDE AND MILLER,
Solicitors.

It is ordered by our said court that the said Peter Doyle, the defendant aforesaid, do enter his appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid, otherwise the bill filed may be taken as confessed.

Which said subpœna was returned as follows, to wit:

Return.

Served on the within-named Peter Doyle, by delivering to him personally a copy of the within subpœna this Oct. 4, 1875.

F. W. OAKLEY,
U. S. Marshal.

At which same time, to wit, the 30th day of September, A. D. 1876, was entered the following order, to wit:

Order to show cause, &c.

U. S. circuit court, western district of Wisconsin.

THE CONTINENTAL INSURANCE COMPANY OF the city of New York
vs.
PETER DOYLE.

On filing the bill of complaint in this cause, verified by the affidavit

of H. M. Finch, and on motion of Finches, Lynde and Miller, solicitors for said complainant, it is ordered that the said defendant show cause, before me, at the court room of the United States circuit court in and for the western district of Wisconsin, at Madison, on Friday, the 8th day of October, A. D. 1875, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an injunction should not issue in this cause, enjoining and restraining him, the said defendant, as secretary of the State of Wisconsin, from revoking, annulling, or cancelling, or taking any steps to revoke, annul, or cancel, any certificate or license granted by the State of Wisconsin to the Continental Insurance Company of the city of New York, authorizing it to do business in the State of Wisconsin, and from publishing in any newspaper, or in any form
12 whatever, any such revocation, annulment, or cancellation, and from doing act whatever assailing or questioning the right of said company to do business in said State; and in the mean time, and until the hearing of this order, the said defendant, his agents, servants, employees, assistants, and attorneys, and each and all of them, are expressly enjoined and restrained from doing any act or taking any step of any kind in any way or manner to revoke, annul, or cancel any certificate or license given to said The Continental Insurance Company of the city of New York by the State of Wisconsin, or from publishing in any way, form, or manner a revocation, annulment, or cancellation of any such certificate or license until the hearing of this order to show cause.

Dated September 30th, 1875.

By the court:

J. C. HOPKINS,
Judge.

Which said order was returned as follows:

Return.

Served the within "order to show cause, with injunctional clause," on the within-named Peter Doyle by delivering to him personally a copy thereof this October 4, 1875. F. W. Oakley, U. S. M.

And afterward, to wit, on the 8th day of September, A. D. 1876, in the record of the proceedings aforesaid in said entitled cause is the following entry, to wit:

United States circuit court, western district of Wisconsin.

13 THE CONTINENTAL INSURANCE COMpany of the city of New York,
vs.
PETER DOYLE.

This cause coming on this day to be heard upon the order to show cause why an injunction should not issue, etc., and after hearing Mr. Finch for the same, it is ordered that a preliminary injunction issue herein as prayed.

Whereupon an injunction issued as follows, to wit:

Injunction.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to Peter Doyle, secretary of state of the State of Wisconsin, and to your attorneys, agents, servants, employees, and assistants, and to each and every of you, greeting:

Whereas it has been represented to the judges of the circuit court of the United States of America for the western district of Wisconsin, in equity, on the part of the Continental Insurance Company of the city of New York, that it has lately exhibited its bill of complaint in said court, before the judges thereof, against you, the said Peter Doyle, secretary of state, defendant in said bill mentioned, to be relieved touching the matters complained of; therefore, and in consideration thereof, and of the particular matters in said bill set forth, you, the said Peter
14 Doyle, secretary of state of the State of Wisconsin, and the persons before mentioned, and each and every of you, and in the penalty which may ensue, are hereby strictly charged and commanded that you, and each and every of you, do absolutely desist and refrain from revoking, annulling, or cancelling, or taking any steps to revoke, annul, or cancel any certificate or license granted by the State of Wisconsin to the Continental Insurance Company of the city of New York, authorizing it to do business in the State of Wisconsin, and from publishing in any newspaper, or in any form whatever, any such revocation, annulment, or cancellation, and from doing any act whatever assailing or questioning the right of said company to do business in said State of Wisconsin until the further order of this court in relation to these matters.

This process is directed to the marshal for the western district of Wisconsin, who is hereby commanded to serve the same upon the said Peter Doyle, if found within his district, and due return thereof make without delay.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 8th day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] F. M. STEWART, *Clerk.*

FINCHES, LYNDE and MILLER,
Solicitors.

15 Upon which said injunction is the following return, to wit:

Return.

Served on the within-named Peter Doyle, secretary of state of the State of Wisconsin, by delivering to him personally a copy of the within injunction this 11th day of October, 1875.

F. W. OAKLEY, *U. S. M.*,
By W. S. MAIN, *Dep.*

And afterward, to wit, on the 2nd day of October, A. D. 1876, come the said defendant, by A. Scott Sloan, attorney-general and solicitor for said defendant, and filed his demurrer as follows, to wit:

Demurrer.

Circuit court of the United States for the western district of Wisconsin.

THE CONTINENTAL INSURANCE COMPANY OF the city of New York,
against
PETER DOYLE, SECRETARY OF STATE OF THE State of Wisconsin.

The demurrer of Peter Doyle, secretary of state of the State of Wisconsin, to the bill of complaint of the Continental Insurance Company of the city of New York, complainant:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereunto, and for cause of demurrer
16 shows that the said complainant has not by its said bill made such a case as entitles it in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing to the said bill of complaint, this defendant does demur to the said bill, and to all matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of Peter Doyle, secretary of state of the State of Wisconsin, to the bill of complaint of the Continental Insurance Company of the city of New York, is well founded in law and proper to be filed in the above cause.

A. SCOTT SLOAN,
Atty. Genl. & Solr. for Deft.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Peter Doyle, being duly sworn, deposes and says that he has read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

PETER DOYLE.

Subscribed and sworn to before me this 2d day of Oct. A. D. 1876.
F. M. STEWART, *Clerk.*

17 And on the same day, to wit, the 2d day of October, A. D. 1876 came the said complainant, and filed its motion to amend its bill as follows:

Motion to amend.

Circuit court of the United States, in and for the western district of Wisconsin.

THE CONTINENTAL INSURANCE COMPANY OF the city of New York
against
PETER DOYLE, SECRETARY OF STATE OF THE State of Wisconsin.

And now comes the said complainant, by Finches, Lynde and Miller, its solicitors, and moves the court now here for leave to amend its said bill by adding thereto the following words, "to an amount exceeding, as your orator is informed and believes, the sum of ten thousand dollars," after the words "and would do great and irreparable damage and injury to the business of your orator in said State," so that the same when amended shall read as follows: "And would do great and irreparable damage and injury to the business of your orator in said State, to an amount exceeding, as your orator is informed and believes, the sum of ten thousand dollars."

FINCHES, LYNDE & MILLER,
Complt.'s Solrs.

Whereupon the following order was made:

On reading and filing the above motion, and after hearing
18 counsel thereon, it is ordered that said motion be and it is hereby granted, and said amendment is allowed to be made to said bill.

By the court.

J. C. HOPKINS,
Judge.

And on this day, to wit, the 3d day of October, of the September term of said court, in the record of the proceedings aforesaid in said entitled cause is the following entry, to wit:

Decree.

Circuit court of the United States for the western district of Wisconsin.

THE CONTINENTAL INSURANCE COMPANY OF the city of New York
vs.
PETER DOYLE, SECRETARY OF STATE OF THE State of Wisconsin.

This cause having been brought on for argument upon the demurrer of the said defendant to the said bill of complaint of the said complainant, and upon hearing Finches, Lynde and Miller, attorneys for complainant, and A. Scott Sloan, esq., attorney for defendant, and the court now being fully and sufficiently advised upon and concerning the same, it is ordered that the said demurrer of the said defendant to the said bill of complaint of the said complainant be, and the same is hereby, overruled.

19 And the said defendant having in open court declined to answer over, and having elected to stand by his demurrer, now, on motion of Finches, Lynde and Miller,

It is ordered, adjudged, and decreed, and this court now here does order, adjudge, and decree, that the injunction heretofore issued in this case under the seal of this court, be and the same is hereby made perpetual, and the defendant, said Peter Doyle, his agents, clerks, attorneys, employees, successor, or successors in office, and each and every of them, are perpetually enjoined and restrained from in any case, or upon any pretense, revoking any certificate or license granted to your orator, authorizing it to do business in the State of Wisconsin, and from publishing or causing to be published in any form any notice of any such revocation, because or on account of the removal or attempt to remove any cause heretofore brought, or which may hereafter be brought in any court of the State of Wisconsin, into the United States circuit court in and for the State of Wisconsin.

And it is further ordered, adjudged, and decreed that the said agreement of the said company contained in its said license, that it would not remove suits brought against it in the courts of the State of Wisconsin, into the United States or Federal courts, is also unconstitutional, illegal, and void, and that so much of said agreement is herewith annulled.

Dated La Crosse, Wis., 3d October, A. D. 1876.

By the court:

J. C. HOPKINS,
Judge.

Whereupon, in open court, at the time of making and signing the foregoing decree, the above-named defendant prays an appeal
20 to the Supreme Court of the United States, which is granted upon the said defendant's executing a bond in the penal sum of one thousand dollars with a good and sufficient surety to be approved by the judge of this court or the clerk thereof; said bond to be filed within sixty days.

By the court:

J. C. HOPKINS,
Judge.

And on the same day, to wit, the 3d day of October, A. D. 1876, came the defendant by his solicitor, and filed his bond as follows:

Bond on appeal.

Know all men by these presents, that we, Peter Doyle, secretary of state of the State of Wisconsin, principal, and Andrew Proudfit and Charles R. Riebsam, both of Madison, Dane County, Wisconsin, sureties, are held and firmly bound unto the Continental Insurance Company of the city of New York in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 3rd day of October, A. D. 1876.

The condition of the above obligation is such that, whereas, on the 3rd day of October, A. D. 1876, a decree was rendered by the circuit court of the United States for the western district of Wisconsin, in the suit of the Continental Insurance Company of the city of New York, complainant, against Peter Doyle, secretary of state of the State

21 of Wisconsin, defendant, perpetually enjoining and restraining the said Peter Doyle, his agents, clerks, attorneys, employees, successor or successors in office, and each and all of them, from in any case, and upon any pretense, revoking any certificate or license granted to the said Continental Insurance Company, authorizing it to do business in the State of Wisconsin, and from publishing or causing to be published, in any form, any notice of any such revocation, because or on account of the removal or attempt to remove any cause theretofore brought, or which might thereafter be brought in any court of the State of Wisconsin, into the United States circuit court in and for the State of Wisconsin, from which decree of said court the said defendant then and there prayed an appeal to the Supreme Court of the United States, which appeal was allowed by said court upon the condition that the said defendant should execute a bond in the penal sum of one thousand dollars, with a good and sufficient surety, conditioned as the law directs:

Now, if the said defendant shall prosecute his said appeal with effect and without delay, and shall pay all damages and costs that may be adjudged against him in said suit, in case the said decree shall be affirmed in said Supreme Court of the United States, then this bond to be void, otherwise in full force.

PETER DOYLE. [SEAL.]
ANDREW PROUDFIT. [SEAL.]
CHAS. R. RIEBSAM. [SEAL.]

Which said bond is endorsed:
Bond approved Oct'r 3, 1876.

J. C. HOPKINS,
Judge.

22 *Certificate to transcript.*

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings in said cause now remaining on file and of record in my office, and that the same is a true and correct transcript therefrom, and also a true copy of the bond on appeal in said case.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, at my office in the city of Madison, in said district, this 5th day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.]

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin.

(Indorsement on cover:) No. 910. Peter Doyle, secretary of state of the State of Wisconsin, appellant, vs. The Continental Insurance Company of the city of New York. Wisconsin C. C. U. S. Filed 1st November, 1876.

Brief of Appellant.

Supreme Court of the United States.

NO. 910.

PETER DOYLE, Secretary of State of the State of Wisconsin,
Appellant,

vs

THE CONTINENTAL INSURANCE COMPANY, of the City of New York,
Appellee.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin

GEORGE B. SMITH
A. SCOTT SLOAN,
Solicitors for Appellant.

Supreme Court of the United States.

PETER DOYLE, Secretary of State of the State of Wisconsin,
Appellant,

against

THE CONTINENTAL INSURANCE COMPANY of the city of New York,
Appellee.

Brief of Appellant.

STATEMENT OF CASE.

The bill of complaint alleges that the complainant, The Continental Insurance Company of the city of New York, is a corporation organized and existing under the laws of the state of Connecticut and a citizen of the last named state.

That prior to the passage of the act of the legislature of the state of Wisconsin, entitled "an act to provide for the incorporation and government of fire and inland navigation insurance companies" approved March 4th, 1870, the complainant had established agencies, opened offices, and made considerable expenditures of money in advertising the business of insurance against loss by fire in the state of Wisconsin. That soon after the passage of said act, complainant complied with the provi-

sions of Sec. 22, thereof, and procured from the State Treasurer and Secretary of State the certificates and license to do business in said state as therein provided, and did subsequently fully comply with said act; but that upon filing appointment of an agent upon whom process of law could be served, complainant was compelled to add an agreement, on its part, not to remove into the federal courts suits brought against it in the state courts, which agreement to that effect was made. That after the decision of this court in Home Ins. Co. vs. Morse 20, Wall 445, the complainant removed a suit brought on one of its policies against it in the state court, into the federal court. That because of such removal a demand was made upon the defendant Peter Doyle, as Secretary of State, that he revoke the certificate or license authorizing the complainant to do business in said state of Wisconsin.

That complainant had a large number of agencies in the state engaged in the conduct of its business and a revocation of its license would work great and irreparable injury to the complainant in its business, in said state, and the complainant feared that said defendant would revoke said license unless restrained by injunction. A temporary injunction was issued restraining the defendant from revoking the license of the complainant, because of the removal of said suit from the state to federal court.

The defendant demurred to the bill. The demurrer was overruled, and a decree entered, making the injunction perpetual. From this decree the defendant appeals.

Sec. 22, Chap. 56, laws of Wis., 1870, provides as follows:

"That any fire insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit or Federal courts, and file in the office of the Secretary of

State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

Sec.'s 1 and 3, Chap. 64, laws of Wis., 1872, provides as follows:

"Section 1. If any insurance company or association shall make application to change the venue or remove any suit or action heretofore commenced or which shall be hereafter commenced in any court of the State of Wisconsin, to the United States Circuit or District Court, or to the Federal Court, contrary to the provisions of any law of the State of Wisconsin, or contrary to any agreement it has made and filed, or may make and file as provided and required by section number twenty-two (22) of chapter fifty-six (56) of the general laws of Wisconsin, for the year A. D. 1870, or any provision of law now in force in said state, or may hereafter be enacted therein, it shall be the imperative duty of the Secretary of State, or other proper State officer to revoke and recall any authority or license or certificate to such company, to do and transact any business in the State of Wisconsin, and no renewal or new license or certificate shall be granted to such company for three years after such revocation, and such company shall therefore (thereafter) be prohibited from transacting any business in the State of Wisconsin until again duly licensed.

Section 3. If any insurance company or association shall make application to remove any case from the state court into the United States circuit or district court or federal court, contrary to the provisions of chapter fifty-six (56) of the general laws of Wisconsin for the year A. D. 1870, or any other state law, or contrary to any agreement which such company may have filed in pursuance of said chapter fifty-six (56) of the general laws of Wisconsin for the year A. D. 1870, or any other law of the State of Wisconsin, it shall be liable, in addition, to a penalty of not less than one hundred dollars or more than five hundred dollars for each application so made, or for each offense so committed for making such application,

the same to be recovered by suit in the name of the State of Wisconsin; and it shall be the imperative duty of the attorney general of the State of Wisconsin to see and attend that all of the provisions of said chapter fifty-six (56) of the general laws of 1870, and the provisions of this act are duly enforced."

ASSIGMENTS OF ERROR.

The questions arising in this case are:

1st. Whether the statute of Wisconsin, requiring foreign insurance companies to make an agreement not to remove suits commenced against them is in conflict with the constitution and laws of the United States, and hence invalid and void.

2d. Whether the sections 1 and 3 of Chap. 64, laws 1872, are in conflict with the constitution and laws of the United States and hence invalid and void.

3d. Whether the Circuit Court of the United States for the Western District of Wisconsin, had jurisdiction to restrain the Secretary of State for the State of Wisconsin from revoking the the license or certificate of the complainant authorizing it to do business in the State of Wisconsin, because of the removal of a suit from the State to the federal court.

BRIEF OF ARGUMENT.

These questions are so fully discussed in the opinion of the Supreme Court of Wisconsin, in the suit of the state of Wisconsin ex. rel Drake vs. Peter Doyle, Secretary of State of the State of Wisconsin, that I do not deem it necessary to do more than cite the portions of that opinion bearing upon the questions, which are as follows, to-wit:

"SUPREME COURT OF THE STATE OF WISCONSIN.

THE STATE *ex rel* A. J. DRAKE,

vs.

PETER DOYLE, SECRETARY OF STATE.

* * * * * * *

IV.

It is contended, not that the statute of the state prescribing the condition upon which license shall be granted, is a violation of the federal constitution, but that it has been so adjudged by the Supreme Court of the United States; and that thereupon and thereby, the statute has ceased to have any force.

For the purpose, as Waite, C. J. remarks, (20 *Wall*, 459,) of putting foreign insurance companies licensed to do business in this state, upon an equal footing with its own companies, Sec. 22 of Chap. 56, Laws of 1870, requires foreign companies, before license, to file an agreement in the Secretary's office, not to remove causes against them from the state to the federal courts.

In *Morse vs. Ins. Co.*, 30 *Wis.* 496, the insurance company had, in violation of its agreement, petitioned the state court to remove the cause from the state to the federal court, under the Act of Congress. This court held the agreement to be a valid relinquishment of the right of such removal, obligatory upon the insurance company, and gave judgment against it. The judgment of this Court was taken by writ of error to the Supreme Court of the United States. And that court in *Ins. Co. vs. Morse*, 20 *Wall*, 445, reversed the judgment of this court, upon the ground that such an agreement did not deprive the insurance company of the right of removal to the federal court, under the constitution and laws of the United States.

The question was certainly not free from difficulty; and while we think, with all due deference, that the weight of authority and sound principle sustain the views of this Court, it is our duty and pleasure to submit to the decision of the federal court, on a point unquestionably within its final jurisdiction.

Under that decision, it follows that the jurisdiction of the

state court in that case was ousted, upon the presentation of the petition to remove the cause to the federal court, and that all subsequent proceedings in the state court were *Coram non judice. Gordon vs. Longest* 16, *Peters* 97. *Kanouse vs. Martin,* 15 *How.* 198. *Ins. Co. vs. Dunn,* 19 *Wall* 214.

The sole question therefore before the federal court, upon the writ of error in *Ins. Co. vs. Morse,* was whether the right of the insurance company to remove the cause to the federal court remained, notwithstanding the agreement. Upon that point only, is the judgment in that case conclusive on this court; upon that point only, is the opinion of that court authoritative with this.

"This Court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. the State of Virginia.* 6 *Wheat* 399, this court was much pressed with some portion of its opinion in the case *Morbury vs. Madison.* And Mr. Chief Justice Marshall said, 'it is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *Exparte Christy* 3, *How* 292 and *Jenness et al vs. Peck* 7, *How* 612, are an illustration of the rule that any opinion given here, or elsewhere, cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." (*Carroll vs. Carroll* 16, *How* 275.)

The rule is elementary, but we choose to give it in the words of the court to whose opinion we consider it presently applicable.

Ins. Co. vs. Morse was decided by a divided court. The opinion of the majority, delivered by Mr. Justice Hunt, applies to the agreement of the insurance company not to remove the cause to a federal court, the general and familiar rule, that parties cannot by contract oust the ordinary courts of their jurisdiction; citing to that effect several cases, English and American, and quoting the rule from Story's Eq., sec. 670, in these words: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary

jurisdiction of the common tribunals of justice, such as an agreement in case of any dispute to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to enforce that agreement, but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced."

Having held the rule to be otherwise applicable to the agreement of the insurance company, the opinion proceeds to inquire whether the agreement gains validity from the statute of the state requiring it, and holds that it does not, because the right of removal is given by the constitution and laws of the United States. And therefore the majority of that court reversed the judgment of this court, on the ground that the petition to remove the cause to the federal court had ousted the jurisdiction of the state court.

So far the opinion deals with the question involved in the case. Having so held, the opinion had exhausted the question before the court; had exhausted its appellate jurisdiction to this court; had exhausted its concern with the statute of the state. In its own view of the question before it, the only concern of that court with the statute of the state was, whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute at best was only before the court collaterally. And we may be pardoned for suggesting that the validity of the statute not being directly involved in the decision, the declaration that it is unconstitutional overlooked the universal rule of all American courts, sanctioned by that court, (*Cooper vs. Telfair*, 4 *Dallas*, 14; *Parsons vs. Bedford*, 3 *Pet.*, 433; *United States vs. Coombs*, 12 *Pet.*, 72.) that courts will avoid an interpretation or application of a statute rendering it unconstitutional, and will hold one so only in plain and peremptory cases. And with the domestic policy of the statute, with the right of the state to refuse license to insurance companies refusing to make the agreement, that court had no concern.

"This court has no authority to revise the act (of Wisconsin) upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the constitution of the United States or the treaties or laws made under it?" (*Carpenter vs. Pennsylvania*, 17 *How.* 456.)

The statute of the state does not assume to prohibit insurance companies taking license under it from removing actions

on the policies from state to federal courts. It only provides that no insurance company shall be licensed under it which shall not file an agreement not to remove them. So that the question in *Ins. Co. vs. Morse* was not whether the statute was in violation of the right of removal, but whether the voluntrry agreement of the insurance company was obligatory upon it. The only question upon the statute before the court was whether it could operate to give validity to the agreement, held to be otherwise invalid. And it is sufficiently plain that the validity of the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject, but the statute remains. And we take it that no provision in the constitution, laws, or treaties of the United States is violated by a statute of the state prohibiting the license of the state to foreign corporations to do business within it upon any condition whatever. The right of the state to refuse such license is absolute; and being absolute, may be exercised at absolute discretion, not to be questioned or abridged anywhere, under any pretence. It was within the appellate jurisdiction of the federal court to refuse effect to the agreement, as ousting the jurisdiction of the federal courts; but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold an insurance company not bound by the agreement when made, as repugnant to the constitution and laws of the United States, but it cannot excuse the agreement as a condition precedent to license under the state statute. So far the statute stands outside of its appellate jurisdiction, raising a pure question of state policy and economy, in a matter within the absolute pleasure of the state. Conceding the invalidity of the agreement, the statute still prohibits license, within the mere discretion of the state, without the agreement; and the statutory license cannot issue without it. In authorizing voluntary licenses, with absolute right to annex any condition to them, the state may exact agreements morally although not legally binding on the licensees. It may be presumed there is some sense of decency even among corporations. It may be presumed that not every insurance company will voluntarily make such an agreement, as a condition of a voluntary and advantageous license, and then deliberately violate it, even with the sanction of the supreme court of the United States. In any view, such a violation is a scandalous breach of good faith, indicating a disposition to bad faith in all the dealings of the company. And though the agreement be not obligatory in law, yet has the state a right to trust to it as obligatory in

conscience, and to refuse licenses to all insurance companies refusing to execute it. In that view of it the federal court has no appellate jurisdiction over the statute; and the declaration that it is unconstitutional was *brutum fulmen*. To that extent, at least, the state retains power over foreign corporations seeking to do business within it. The statute is indeed inoperative to give validity to the agreement, ousting the jurisdiction of the federal courts. So the supreme court of the United States has decided. But it is operative to prescribe the conditions on which the state, in the exercise of its sovereign authority, sees fit to license foreign corporations within it. That is for this court, not that, to determine. No foreign insurance company need come here under the agreement; coming, every foreign insurance company violating the agreement is guilty of a moral fraud upon the state. And in upholding the statute to this extent, against the extrajudicial *dictum* of the supreme court of the United States, we may quote in our own behalf the language of one of the great chief justices of that court: "A sanction is claimed to a breach of trust, and a violation of moral principle. In such a case the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice." (*Hannay vs. Eve*, 3 *Cranch*, 242.)

The provision in Sec. 22 of Chap. 56 Laws of 1870, requiring the agreement as a condition of license, was alone before the Court in *Ins. Co. vs. Morse*. And so far we have considered it by itself. But this writ is applied for, not under that section, but under Chap. 64 Laws of 1872. And the two statutes, taken together, put the whole subject in a view, which was not before the Court in that case, and could not properly be in any case of its appellate jurisdiction. The former statute requires the agreement: the latter statute provides for the revocation of any license issued, upon violation of the agreement. And, the agreement being invalid to oust the jurisdiction of the federal Courts, the two provisions together are equivalent to one, requiring the revocation of a license issued to a foreign insurance company, upon its application to remove an action on its policy, from a state to a federal court.

The statute extended to these foreign insurance companies the privilege of doing business in this State, on equal footing with domestic companies. Experience showed their power to harass the citizens of the State doing business with them, by removing actions on their policies from Courts of the vicinage, to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretense for

questioning the power of the State, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The State has power to make its voluntary license subject to forbearance of a right, and revokable upon its exercise. The right may survive the license, but the license cannot survive its exercise. So grants are sometimes made upon condition to forbear a right. It was for the authorities of the State alone to judge that the exercise of the right is an abuse of the privilege of the license. With that question, federal courts have no concern. They can hold, as they have, that the right exists in pending actions; but they have no jurisdiction over the question whether foreign corporations, exercising the right, shall be permitted by the State to do business within it. That is matter of State policy, State law, State jurisdiction.

The distinction between the validity of the agreement, and the validity of the statute, is readily illustrated. It is quite clear that the Secretary of State takes no authority under the statute, to license a foreign insurance company not executing the agreement. That is a condition precedent to his authority. This Court would assuredly refuse to compel him to act in disregard of the statute which confers his authority. And we take it that the Supreme Court of the United States would hardly claim appellate jurisdiction to review our decision, or to compel a State officer to act officially for the State, in disregard of the letter of his authority, on the ground that the agreement, when executed, is inoperative to oust the jurisdiction of the federal Court.

"We have hitherto considered the agreement in the light in which it is held by the opinion in Ins. Co. vs. Morse. But with great deference we are unable to consider the construction of the agreement there expressed to be correct, even within the views of the court itself. It is held to be repugnant to the constitution and laws of the United States. But an agreement not to remove a cause from a State to a Federal court, though it will not be enforced as obligatory against removal, does not appear to be in itself repugnant to any law. The party may keep it in good faith without offense against the law. Courts will not indeed enforce it; but, in the language of Judge Story, leave the parties to their own good pleasure in regard to it. Had the insurance company in that case complied with the agreement, and not removed the cause, it would have been guilty of no violation of the constitution or laws of the United States. In the view taken of it by the Supreme Court, it is ineffectual but not illegal. We have seen no case holding such an agreement illegal, though it has been sometimes called

nugatory. In the leading case of Kill vs. Hollister, 1 Wilson, 129, it was held that an agreement to arbitrate did not bar the action, because there had been no submission under it; the court intimating that a submission under it would have been a bar. And it has been held that, though such an agreement will not defeat an action brought under it, yet an action will lie on it for breach of it. (Livingston vs. Rolli, 5 Ellis & Bl., 132. See also Nute vs. Ins. Co., 6 Gray, 174; Hobbs vs. Ins. Co., 56 Me., 417.)"

It appears to us to be very plain that the statute of 1870 is a valid enactment: that its validity was not involved in the decision of *Ins. Co. vs. Morse:* that its validity, as a limitation upon the issue of licenses under State authority, was not within the appellate jurisdiction of the Court: and that the declaration in the opinion that it is repugnant to the constitution and laws of the United States and therefore void, is but an improvident and erroneous expression of the learned Judge who delivered the opinion. With all due deference, we may be permitted to say of it what Lord Mansfield said of a *dictum* of Chief Justice Holt: "That is an *obiter* saying only: and not a resolution or determination of the Court, or a direct solemn opinion of the great judge from whom it dropped." (*Sanderson vs. Rowles* 4 *Burr.* 2064.)

The opinion proceeds to discuss the relations of foreign corporations to the state, in a scope wholly foreign to the judgment in the case, and in a tone inconsistent with decided cases in that Court: and therefore, so far, of no authority there or here. It is sufficient for this case that that great tribunal has frequently and uniformly held that the corporations of one state have no right to migrate to another, there to exercise their franchises, except upon the assent of such other state: and that such assent may be granted upon such terms and conditions as the state granting it may think proper to impose. (*Ins. Co. vs. French* 18 *How.* 404: *Paul vs. Virginia.* 8 *Wall.* 168: *Ducat vs. Chicago.* 18 *Wall.* 410: *Ins. Co. vs. Massachusetts ib.* 566: *Osborn vs. Mobile,* 16. *Wall.* 479.)

Paul vs. Virginia was the case of an insurance company of New York, doing business in Virginia under a statute of the latter state, prohibiting foreign insurance companies from doing business there, without license to be granted upon conditions precedent. It was decided as late as 1868. And the Court uses this language:

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank of Augusta vs. Earle:* 'It must dwell in the place of its creation, and cannot

migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states —a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely: they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." And this doctrine is expressly affirmed in *Ducat vs. Chicago,* a like case in 1870.

The doctrine is so sound in itself, and so many of the decisions of that Court on other subjects would be disturbed or subverted by a departure from it, that we feel safe in holding it to be the settled law of the federal Supreme Court, notwithstanding intimations to the contrary, in the opinion in *Ins. Co. vs. Morse:* another reason for regarding these as not sufficiently considered, as is apt to be the case with all *obiter dicta.*

V.

But if we should be mistaken in all this, if the provision of the statute of 1870 requiring the agreement, be unconstitutional, there is another view of the case in our judgment conclusive of it.

Morse vs. Ins. Co. was decided in 1874, and reported in 1875. The legislature of the state has since been in session. And there is no doubt that their attention was called to the decision. Yet, though they have since enacted at least one statute, Chap. 300 Laws of 1876, amending the general insurance laws, they have not repealed or modified the provision requiring the agreement. This is a strong confirmation of our view, derived from the statute itself and its history, that the legislature would not have adopted or retained the statute authorizing licences to foreign insurance companies, without the provision for the agreement. It is not an independent provision, to fall by itself. The other provisions of the statute in regard to license, cannot be executed independently of it. It was evidently designed as a compensation for the provisions authorizing licenses, an inducement to them. And it is the settled doctrine of this Court that, if it be

unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. (*Slawson vs. Racine*, 13 *Wis.* 398; *Lynch vs. The "Economy,"* 27 *Wis.* 69; *State vs. Dousman*, 28 *Wis.* 541.)

In that view of the statute, no license to foreign insurance companies would be authorized by law; the Secretary of State would have acted without color of authority in issuing the license in question; the license would give no color of right to the insurance company to do business within the state; and it would be our undoubted duty to compel the Secretary to undo an offiicial act, done without authority, an infringement upon the prerogatives of the state, and a usurpation of the sovereign authority.

VI.

The return pleads in bar of the peremptory writ, an injunction of the Circuit Court of the United States for the Western District of Wisconsin, issued upon a bill filed in that court by the Insurance Company against the Secretary of State, restraining that officer from revoking the license of the state to the Insurance Company. And the brief of the Attorney General takes the position that the federal Court had jurisdiction of the bill; and that jurisdiction of the subject matter having first attached in that Court, the jurisdiction of that court is exclusive of the jurisdiction of this.

* * * * * * * * * *

As originally adopted, the federal constitution extended the judicial power of the United States to controversies "between a state and citizens of another state;" vesting in the Supreme Court of the United States original jurisdiction in all cases "in which a state shall be a party". This grant of original jurisdiction in such cases to that great court appears to have been considered exclusive. (*Federalist No.* 80; *Story's Const. Sec.* 1682; 1 *Kent.* 298; *Georgia vs. Brailsford*, 2 *Dallas* 415; *Cohens vs. Virginia*, 6, *Wheaton*, 264.)

The jurisdiction was probably intended to apply only to cases in which a state should be plaintiff. But it was held to embrace all controversies between states, whether plaintiffs or defendents, and citizens of other states; so far reducing a sovereign state to the condition of a private corporation. (*Chisholm vs. Georgia*, 2 *Dallas* 419.) This was probably a surprise, certainly an offense, to most if not all of the states. Says Chancellor Kent:

"The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but

the states were not willing to submit to be arraigned as defendants before the federal courts, at the instance of private persons, be the cause of action what it might. The decision of the Supreme Court of the United States, in the case of *Chisholm vs. The State of Georgia*, decided in 1793, in which it was adjudged that the state was suable by citizens of another state, gave much dissatisfaction, and the legislature of Georgia carried their opposition to open defiance of the judicial authority. The inexpediency of the power appeared so great, that Congress, in 1794, proposed to the states an amendment to that part of the Constitution, and it was subsequently amended in this particular, under the provision in the fifth article". (1 *Kent.* 296.)

The amendment is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state".

The manifest object of the amendment was to preclude the federal courts from jurisdiction over a state, in any case, at the suit of private parties. And by all rules of construction, the prohibition should apply to all cases in which the interest of a state is so concerned that it ought otherwise to be a party. But the intent and letter of the amendment have been greatly narrowed by the effect given to it by the decisions of the Supreme Court of the United States.

The Constitution designed that Court to be, as it is, a great national tribunal, a court of last resort on all questions of national character; and a court of a dignity and authority unequaled by any tribunal known in modern history, not perhaps excepting the imperial chamber at Wetzlar, to which it has been compared, (*Federalist No.* 80; *Story's Const. Sec.* 1679; 1 *Kent.* 296.) And yet that august tribunal has no general jurisdiction, but is essentially a court of defined and limited jurisdiction, original and appellate. We speak with profound deference to that Court, in saying that it should be matter of surprise to no jurist, to no student of history, that so august a tribunal, so constituted and limited, should have from the beginning proved impatient of the limited scope of its own authority and that of the inferior federal courts on which its own jurisdiction chiefly rests; gradually and sometimes almost insensibly extending it, and signally illustrating the maxim, *ampliare jurisdictionem.* Its wiews of federal jurisdiction have always been aggressive. It has but illustrated a general human tendency, a common phase of judicial history, in gradually enlarging the letter of its jurisdiction by construction; until its jurisdiction by implication appears to exceed its jurisdiction

by express grant; until it appears to be loaded down and impeded, we might almost say overwhelmed, by excess of jurisdiction, presumably never contemplated by the framers of the constitution.

And it was perhaps hardly to be expected that an amendment to the constitution, abolishing a jurisdiction originally granted by that instrument to federal courts would be kindly regarded by so great a court so constituted, or favorably construed for the prohibition and against the jurisdiction. So it has surely proved.

The amendment appears to have been first before the Court in *Hollingswoth vs. Virginia*, 3 *Dallas* 378. The question was the effect of the amendment upon pending suits. And the court "delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects, of any foreign state". But a few years later, in a cause in which a state claimed an interest but was not a party, the court used this language:

"The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the Courts of the United States, is not affected by this amedment; nor can it be so construed as to oust the Court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant in a suit brought by an individual; but it remains the duty of the Courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of admirality, which were admitted to be in their possession. If the proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the Court, and prevent their looking into the suggestion, and examining the validity of the title." (*United States vs. Peters*, 5 *Cranch* 115.) It will be presently seen that the suggestion here thrown out is the seed of great growth of jurisdiction, inconsistent with the spirit of the amendment, if not with its letter.

The amendment appears to have next come before the Court in *Cohens vs. Virginia*, 6 *Wheat*, 264. The state had prosecuted the plaintiffs in error criminally in one of her courts, and there was judgment of conviction against them. They sued out a writ of error from the Federal Supreme Court to the state Court, against the state; the state being defendant in error in that Court. Notwithstanding the amendment, the Court claimed jurisdiction of the cause, upon the ground that such a proceeding was not a suit within the meaning of the amendment, though it sujected the state to a judgment in that court, at the suit of a private party. And the Court has hitherto adhered to that rule in numerous cases.

In *Osborn vs. U. S. Bank*, 9 *Wheat*, 738, the Court thus states the question: "The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a state from the suit of citizens of other states or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the state, and on the property in their hands." And the Court thus states its conclusion: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where juisdiction depends on the party, it is the party named in the record. Consequently the 11th amendment, which restrained the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens. This State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." The court then proceeds to show that the officers of the State, who were the parties to the record were personally liable to the bank, and therefore had a real, personal interest, under the State indeed, but distinct from the interest of the State; and upon that ground upheld the decree against them.

This is the leading case upon the subject. And it is very distinguishable from the case before us, in which the Secretary

of State has no interest whatever; is a mere nominal party, the State alone having the whole interest in the subject; a mere shadow of the State, set up for jurisdiction against the body, over which jurisdiction is prohibited by the Constitution.

The next case which we find is *Governor of Georgia vs. Madrazo*, 1 *Peters*, 110. That was a case in admiralty, in which the Governor of the State intervened in behalf of the State. And the court uses this language:

"Previous to the adoption of the 11th amendment to the Constitution, it was determined that the judicial power of the United States extended to a case in which a State was a party defendant.

"This principle was settled in the case of *Chrisholm vs. Georgia*, 2 *Dal.* 419. In that case, the State appears to have been nominally a party on the record. In the case of *Hollingsworth vs. Virginia*, also, in 3 *Dal.*, 378, the State was nominally a party on the record.

"In the case of *Georgia vs. Brailsford*, 2 *Dal.*, 402, the bill was filed by his excellency, Edward Telfair, Esq., Governor and Commander-in-Chief in and over the State of Georgia, in behalf of the said State. No objection was made to the jurisdiction of the court, and the case was considered as one in which the Supreme Court had original jurisdiction, because a State was a party. In the case of *New York vs. Connecticut*, 4 *Dal.*, 3, both States were nominally parties on the record. No question was raised in any of the cases respecting the style in which a State should sue or be sued, and the presumption is that the actions were admitted to be properly brought. In the case of *Georgia vs. Bailsford* the action is not in the name of the State, but it is brought by its chief magistrate in behalf of the State.

"The bill itself avows that the State is the actor, by its Governor.

"There is, however, no case in which a State has been sued without making it nominally a defendant.

"*Fowler et al. vs. Lindsey et al.*, 3 *Dal.*, 411, was a case in which an attempt was made to restrict proceedings in a cause depending in a circuit court, on the allegation that a controversy respecting soil and jurisdiction of two States had occurred in it.

"The court determined that a State not being a party on the record, nor directly interested, the circuit court ought to proceed in it. In the *United States vs. Peters*, the court laid down the principle that, although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction."

"In the case of *Osborn vs. The Bank of the United States*, 9 *Wheat*,

738, this question was brought more directly before the court. It was argued with equal zeal and talent and decided on great deliberation. In that case, the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case, the court said, 'It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.' The court added: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'

"The information of the Governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill, filed by the Governor of Georgia on behalf of the state, against Brailsford.

"If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this.

"The bill of Madrazo alleges that the slaves which he claims were delivered over to the government of the state of Georgia, pursuant to an Act of the General assembly of the said state, carrying into effect an Act of Congress of the United States, in that case made and provided; a part of the said slaves, sold, as permitted by said Act of Congress, and as directed by an act of the General Assembly of the said state; and the proceeds paid into the treasury of the said state, amounting to thirty eight thousand dollars or more."

The governor appears, and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the Legislature of Georgia, made to give effect to the Act of Congress on the subject of negroes, mulattoes or people of color, brought illegally into the United States; and the proceeds of those sold to have been paid in the treasury, and to be no longer under his control.

"The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an Act of Congress. The possession has been acquired by means which it was lawful to employ.

"The claim upon the governor, is as a governor; he is sued,

not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can regularly be pronounced.

"But were it to be admitted, that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress; and has done nothing in violation of any law of the United States.

"The decrease is not to be considered as made in a case in which the Gouvernor was a defendant in his personal character; nor could a decree against him in that character be supported.

"This decree cannot be sustaind as against the state, because, if the 11th amendment to the Constitution, does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustaind as a suit, prosecuted not against the state but against the thing, because the thing was not in possession of the District Court.

"We are therefore of oppinion, that there is error in so much of the decree of the Circuit Court, as direct that the said slaves libelled by Juan Modrazo, and the issue of the females now in the custody of the government of the state of Georgia, of the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves, who were sold by order of the governor of the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the Governor of Georgia, and the claim of William Bowen".

Governor of Georgia vs. Madrazo was followed and affirmed in *Kentucky vs. Dennison, Governor*, 24 *How.* 66. This was an application for *mandamus*, by the Governor of Kentucky against the

Governor of Ohio, within the original jurisdiction of the Supreme Court, to enforce the performance of an executive duty by the defendant Governor. Of course the *mandamus* could not go to the state, but to its officer only. And the objection was taken that it was not a case between two states, to give jurisdiction to the court, under the Constitution. But the court holds;

"So, also, as to the process in the name of the Governor, in his official capacity, in behalf of the state.

"In the case of *Madrazo vs. The Governor of Georgia* 1 *Pet.* 110, it was decided; that in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the Governor in behalf of the state, and was indeed the form originally used, and always recognized as the suit of the state.

"Thus, in the first case to be found in our reports, in which a suit was brought by a state, it was entitled, and set forth in the bill, as the suit of the state of Georgia, by Edward Telfair, Governor of the said state, complainant, against Samuel Brailsford and others; and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of 'His Excellency Edward Telfair, Esquire, Governor and Commander-in-chief in and over the state of Georgia, in behalf of the said state, complainant, against Samuel Brailsford and others, defendants'.

"The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show that * * * it has also been settled that where the state is a party, plaintiff or defendant, the Governor represents the state, and the suit may be, in form, a suit by him as Governor in behalf of the state, where the state is plaintiff, and he must be summoned or notified as the officer representing the state, when the state is defendant.

"We may therfore dismiss the question of jurisdiction without further comment, as it is very clear that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished."

What is said in *Governor of Georgia vs. Madrazo*, and in *Kentucky vs. Dennison*, of the Governor of a state, applies equally to any other state officer acting for the state *virtute officii*. The question is not one of the dignity of the office, but of the repre-

sentation of the state *pro hac vice*. "In the application of this principle, there is no difference between the governor of a state, and officers of a state of lower grades. In this respect they are upon a footing of equality." (*Davis vs. Gray*, 16 *Wall.* 203.)

The opinions of the court in *Osborn vs. The Bank*, and *Governor of Georgia vs. Madrazo*, were both delivered by Marshall, C. J., and the opinion in *Kentucky vs. Dennison* by Taney, C. J., two of the most illustrious jurists known in the history of jurisprudence among the great English speaking common law peoples. Their doctrines were surely well and wisely considered, are entitled to the most profound deference, and not lightly to be overruled. And these cases are in entire accord upon two propositions, both conclusive of the question before us.

1st. That where a suit is prosecuted in a federal court by a private party against a state officer, in which the state has a direct interest but cannot be made a party, the officer himself must have an interest or liability in the subject matter upon which the jurisdiction of the court can attach; and,

2d. That where such a suit is prosecuted against a state officer having no such interest or liability, in his official capacity only, to affect a right of the state, the state is the real defendant within the prohibition of the amendment of the constitution.

These rules are vital. Where there is such an interest or liability of the officer personally, the jurisdiction of a federal court might be held to attach, against him personally, upon such interest or liability, without direct violation of the constitutional amendment prohibiting jurisdiction against the state. But where there is no such personal interest or liability of the officer, and the suit is against him in his official capacity only, for the purpose of reaching an interest or liability of the state, then jurisdiction attaches on the interest or liability of the state, not of the officer. The state is the real defendant, and the officer only a nominal defendant; and jurisdiction is as much prohibited as if the state itself were defendant. To hold that jurisdiction could in such a case be exercised against the state, in the person of its officer, would be a direct and mere evasion of the constitutional prohibition, which the judges of all courts, federal and state, are sworn to support, which no judicial construction of any court can erase from the paramount law of the land.

The subject matter of Governor of Georgia vs. Madrazo came again before the court, *ex parte* Juan Madrazo, 7 Peters 627, upon application to file a libel in admiralty against the state. The application was denied, the chief justice saying of it: "It is a mere personal suit against a state, to recover proceeds in

its possession, and in such a case no private person has a right to commence an original suit in this court against a state."

Osborn vs The Bank, Governor of Georgia vs Madrazo and Kentucky vs Denison, are so closely connected in principle that we have considered them together, a little out of the order of the latter case. Between *Governor of Georgia vs Madrazo* and *Kentucky vs Denison* another case came before the court and has its place in the reports, in which the jurisdictional question might have properly arisen. This is *Dodge vs Woolsey*, 18 *How.* 331. It was the case of a bill filed in an inferior federal court, by a private party, against a tax collector of the state, to restrain the collection of a state tax. Several questions raised and passed upon by the court in that case, quite foreign to the question which we are considering. The jurisdictional question before us, arising under the amendment of the constitution, appears not to have been raised at the Bar or considered by the Court. The jurisdiction of the federal courts over the subject matter, in other respects, is discussed; but not the jurisdiction over the state officer, acting officially, without interest, within the constitutional prohibition. It appears quite obvious that this question was altogether overlooked. Indeed the court says, of the case of *State Bank vs Knoop*, 16 *How.* 369. "It rules this in every particular, and to the opinion there given we nave nothing to add, nor anything to take away." *State Bank vs Knoop* did indeed involve the questions passed upon in Dodge vs Woolsey: but it was a writ of error to a state court and could not possibly involve the jurisdiction of a federal court, in an original suit against a state officer acting officially. The oversight is the more to be regretted because the assumption of jurisdiction in *Dodge vs Woolsey* disregards the two conditions before noticed as solemnly established in *Osborn vs The Bank* and *Governor of Georgia vs Mandrazo*, subsequently confirmed in *Kentucky vs Denison*. But the rule applies to it, that a case which overlooks a point cannot be held to overrule cases expressly deciding the very point. And the positive rules of *Osborn vs The Bank* and *Governor of Georgia vs Mandrazo*, must be held to survive the silence of *Dodge vs Woolsey*. If this were otherwise the negative authority of Dodge vs Woolsey on the question of jurisdiction, must be taken to be overruled by the positive authority of the later case of *Kentucky vs Dennison*.

Then comes *Davis vs. Gray*, 16 *Wall* 203, where a receiver appointed in a cause pending in an inferior federal court, filed his bill in the same court against the governor and another officer of a state, to restrain them in executing the law of the state. The question of jurisdiction was raised and discussed by the Court. and Mr. Justice Swayne who delivered the opinion, says of the question:

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

"In *Osbone vs. The bank of the United States*, three things among others, were decided.

"(1.) A Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2.) Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

"(3.) In deciding who are parties to the suit the Court will not look beyound the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping a bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

"*Dodge vs. Woolsey, The State Bank of Ohio vs. Knoop, The Jefferson Branch Bank vs. Skelly, Ohio Life and Trust Company vs. Debolt and The Mechanics' and Traders' Bank vs. Debolt*, proceeded upon the same principle, and were controlled by that authority, with respect to the jurisdictional question arising in each of these cases as to the defendants."

And again, speaking of parties: "We feel no difficulty in disposing of the case as it is presented in the record."

This case professes to follow *Osborn vs. The Bank*; but it is extraordinary that it takes no notice of the essential rule cited from that case, that defendant state officers, to give jurisdiction, must themselves have an interest or liability in the subject matter. And it is more extraordinary still that, quoting several cases with, at best, a very remote bearing on the question, the opinion makes no reference to *Governor of Georgia vs. Madrazo or Kentucky vs. Dennison;* with both of which the opinion is directly in conflict, as well as with the rule in *Osborn vs. The Bank*. And, with all due respect, we think it may be said of *Davis vs. Gray*, that, instead of following the well considered and established rules in *Osborn vs. The Bank, Governor of Georgia vs. Madrazo* and *Kentucky vs. Dennison*, it rather follows, presumably by inadvertence, the blind lead of *Dodge vs. Woolsey;* itself an incongruity, sandwiched in the reports between inconsistent decisions.

We cannot think the vital principle established in *Osborn vs. The Bank* or the judgments in *Governor of Georgia vs. Madrazo* and *Kentucky vs. Dennison*, overruled by *Davis vs. Gray*. These cases are too solemn and of too high authority to be set aside *sub silentio*. We cannot but think that they were overlooked: the learned judge who delivered the opinion being misled by the unconsidered and unfortunate departure from those cases, of *Dodge vs. Woolsey*.

Woodruff vs. Trapnell, 10 *How.* 190, *Curran vs. The State of Arkansas*, 15 *How.* 304, *State Bank vs. Knoop*, 16 *How.* 369, *Ohio L. L. T. Co. vs. Debolt*, 16 *How.* 416, *The Bank vs. Debolt*, 18 *How.* 380, *and The Bank vs. Skelly*, 1 *Black.* 436, cited in the opinion to support jurisdiction in *Davis vs. Gray*, were all writs of error to state Courts to be classed with *Cohens vs. Virginia*. And their authority for original jurisdiction in an inferior federal Court, is not perceived. And it may be said in passing, that the learned judge who delivered the opinion was in error, in saying that in *Woodruff vs. Trapnell*, a writ of *mandamus* was issued to the proper representative of the state. The judgment of the Supreme Court of the state was simply reversed in the usual form. So in *Curran vs. Arkansas*, the judgment of the state Court was reversed: the Federal Supreme Court simply following the State Supreme Court, in holding that such a suit would be against the state, by her own law, in her own Courts.

When the decisions of a state Court vary, in interpretating state law, the Supreme Court of the United States makes its own election which it will follow. (*Gelpcke vs. Dubuque*, 1 *Wall.* 175.) We may, with profound respect, presume here upon the like right of choice: and we prefer to hold the rules in *Osborn vs. The Bank, Governor of Georgia vs. Mandrazo* and *Keniucky vs. Dennison*, as the more authoritative and well considered cases to settle the law of that Court, unless expressly overruled. When adjudications so solemn and so well considered are disregarded or forgotten in the Court, none of us may presume to say, *Indignor:* but surely all of us should recall sounder and safer principles established in that great Court, *quandoque bonus domitat Homerus.*

And the rules established in *Osborn vs. The Bank, Governor of Goergia vs. Madrazo* and *Kentucky vs. Dennison*, exclude jurisdiction of the federal Court of the bill and injunction pleaded by the Secretary of State in this case.

Our conclusion would not be different, if we were to accept *Davis vs. Gray* as overruling the earlier cases, and establishing a different rule. For that case does not go the length, no case which we have been able to find in that Court does, of holding that the state would be bound, in the exercise of its authority,

by the proceeding in the federal Court against its officers. Conceding the power of the federal Court to bind the officer, as between him and the plaintiff who sues him, the constitutional amendment absolutely prohibits it from binding the state, as against either the plaintiff or its own officer. In such a case the private party seeking his remedy against the officer, must be content with that, *valeat quantum*. He can have none against the state, or binding the state, or binding the officer against the state. Against the authority of the state over its own officer, against the officer's duty to the state, federal process in such a case can avail nothing. It is more than the case of one not bound by a judgment, because not a party. It is not the case of one without the jurisdiction of the Court, but of one above the jurisdiction. It is the case of a sovereign state, over which the charter creating the federal Courts, for grave political reasons, prohibits jurisdiction in such cases: has abrogated the jurisdiction once improvidently granted. It would be a singular perversion of all judicial rule to hold that the state could not be bound as a party, but is bound without being a party. And it would be a simple nullification of the constitutional amendment, to hold the state in any way bound by the judgment of a federal Court against its officer, at the suit of a private party. That would be, not judicial construction, not judicial stretch of jurisdiction, but judicial revolution.

And it would involve the singular absurdity that, while the original Constitution which expressly gave jurisdiction, at the suit of private parties, against a sovereign state, confined such jurisdiction to the Supreme Court of the United States; a court worthy of such jurisdiction, if any federal court could be; the amendment prohibiting such jurisdiction in any federal court, would subject a sovereign state, in the person of its officer, and the administration of the state government, to the process of any petty federal court which Congress might see fit to establish, at the suit of any vagabond citizen or corporation of another state, doing business in it.

We abide by the letter and spirit of the Constitution. Unfortunately many things in its administration are tending toward centralization, which the history and temper of the American people give grave warning might be closely followed by disintergration. The integrity of the Union has been tried. The integrity of the states is on trial. Much rests upon the moderation and forbearence of the federal courts; as much perhaps upon the firmness of the state courts, refusing to abdicate state authority, in state matters, to assumption of federal jurisdiction. We will faithfully try to do our part. In refusing, at the last term, to assume a jurisdiction properly be-

longing to the federal courts, we had occasion to say, and we now repeat:

"It is perhaps unfortunate that the federal Constitution left any ground for concurrent jurisdiction of the federal with the state courts. It has led to some mischievous confusion of adjudication and some vicious usurpation of jurisdiction, by both federal and state courts. In this day, this is a great and growing evil. And we propose, in this state, for the sake of judicial order and of the integrity of the federal and state governments, to do what we may towards confining the courts of the state to state jurisdiction, and the courts of the United States to federal jurisdiction". *Bromly vs. Goodrich, ante.*

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VII.

The writ in this case will issue in the right of the state, at any hazard to its officer. We apprehend however that there will be none. The State officer is bound to obey the state authority. And if any one, to be found within the state, should molest any officer of the state for obeying the process of this court, in the administration of the state government, and the fact should be properly brought before us, we think we should be able to afford ample and summary remedy.

We regard this matter as a grave attempt to baffle state authority, in the administration of state affairs, in a way to be a temptation for the use of a somewhat unjudicial adjective. And we are thoroughly in earnest, as is our duty under our oaths, to enforce state authority, in state affairs, over state officers, and on foreign corporations who come here *ex gratia* of state law, and then set the law at defiance. We mean to suffer no trifling here. The writ must be so framed that the Secretary not only shall promptly revoke the existing license, but shall refrain from granting any other license to the Insurance Company for three succeeding years; and that he certify the revocation to this court, within twenty four hours after service of the writ upon him.

Let the writ issue at once in accordence with this opinion."

GEO. B. SMITH,
A. SCOTT SLOAN,
Solicitors for Appellant.
Madison, Wis.

Supreme Court of the United States.

No. 910.

PETER DOYLE, Secretary of State of the State of Wisconsin,
Appellant.

vs.

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK,
Appellee.

BRIEF OF APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

WM. ALLEN BUTLER,
B. J. STEVENS,
I. C. SLOAN,
Solicitors for Appellees.

suit for trial into the United States Circuit or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

Section 1 of chapter 91, laws of 1873, is as follows:

"If any insurance company or association shall make application to change the venue or remove any suit or action heretofore commenced or which shall be hereafter commenced in any court

Supreme Court of the United States.

PETER DOYLE, Secretary of State of the State of Wisconsin,
Appellant.

vs.

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK,
Appellee.

BRIEF OF APPELLEE.

This case presents two questions:

I.

Whether the statutes of Wisconsin requiring foreign insurance companies to file with the Secretary of State of Wisconsin an agreement not to remove suits from the State to the federal courts, and subjecting such foreign corporations to a forfeiture of their license and right to do business in the state, and to pecuniary penalties in case they do remove suits in violation of the statute, are in conflict with the constitution and laws of the United States, and hence invalid and void.

The following are the statutes of Wisconsin which are drawn in question in this case:

Section 22, chapter 56, laws of 1870, provides,

"That any insurance company, association or partnership, incorporated by or organized under the laws of any other state of the United States, desiring to transact any such business as aforesaid by any agent or agents in this state, shall first appoint an attorney in this state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

Section 1 of chapter 64, laws of 1872, is as follows:

"If any insurance company or association shall make application to change the venue or remove any suit or action heretofore commenced or which shall be hereafter commenced in any court

of the state of Wisconsin, to the United States circuit or district court, or to the federal court, contrary to the provisions of any law of the state of Wisconsin or contrary to any agreement it has made and filed, or may make and file as provided and required by section number twenty-two (22) of chapter fifty-six (56) of the general laws of Wisconsin, for the year A. D. 1870, or any other provision of law now in force in said state, or may hereafter be enacted therein, it shall be the imperative duty of the secretary of state or other proper state officer, to revoke and recall any authority or license, or certificate to such company, to do and transact any business in the state of Wisconsin, and no renewal or new license, or certificate shall be granted to such company for three years after such revocation, and such company shall therefore [thereafter] be prohibited from transacting any business in the state of Wisconsin until again duly licensed."

Section 3, said chap. 64, is as follows:

"If any insurance company or association shall make application to remove any case from the state court into the United States circuit or district court, or federal court, contrary to the provisions of chapter fifty-six (56), of the General Laws of Wisconsin for the year A. D. 1870, or any other state law, or contrary to any agreement which such company may have filed in pursuance of said chapter fifty-six (56), of the General Laws of Wisconsin for the year A. D. 1870, or any other law of the state of Wisconsin, it shall be liable, in addition, to a penalty of not less than one hundred dollars or more than five hundred dollars for each application so made, or for each offense so committed for making such application, the same to be recovered by suit in the name of the state of Wisconsin; and it shall be the imperative duty of the attorney general of the state of Wisconsin to see and attend that all of the provisions of said chapter fifty-six (56) of the General Laws of 1870 and the provisions of this act are duly enforced."

II.

Whether, if the foregoing statutes are held to conflict with the rights of the appellee, The Continental Insurance Company of the city of New York, the circuit court of the United States for the Western District of Wisconsin had jurisdiction to restrain the secretary of state of the state of Wisconsin from exercising the power attempted to be conferred upon him by sec. 1, chap. 64, Laws of 1872, to revoke the license of the appellee because it had exercised its right to remove a suit from the state to the federal court.

We understand that both of the questions raised here have been fully decided and settled by late decisions of this court.

The first question is fully disposed of in the case of Insurance Company v. Morse, 20 Wall., 445, which expressly adjudges that provision of sec. 24, chap. 56, Laws of 1870, which requires foreign insurance companies to file agreements not to remove suits from the state to the federal court, to be void. The principles decided in that case are stated so clearly and distinctly that there is no room for doubt or controversy on the subject. On page 458 the court say:

"On this branch of the case the conclusion is this:

"1st. The constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court upon compliance with the terms of the act of 1789.

2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void.

3d. The agreement of the Insurance Company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed."

The statute which requires the agreement not to remove suits having thus been held to be absolutely void, there can be no doubt that those statutes which denounce penalties for exercising the right which is sought to be restrained by the unconstitutional statute, are also void, whether those penalties consist of a forfeiture of the license and right of the company to do business, or of the money penalties and fines imposed by the statute.

These corporations are citizens of the states which create them, that citizenship is expressly recognized by this court in Insurance Co. v. Morse, *supra*, page 453. The court say:

"This court has repeatedly held that a corporation was a citizen of the state creating it within the clause of the constitution extending the jurisdiction of the federal courts to citizens of different states."

It would seem to be a neglect of a constitutional duty for this court to allow a citizen to be punished either by forfeiture of its

license or by pecuniary fines, for exercising a right secured to it by the constitution and laws of the United States.

Void statutes are as no statutes; when the statute restraining the removal of suits is held to be void, all proceedings of which such statute is the foundation must also be held to be null and void.

These propositions would be regarded as too plain for argument, were it not that, in a case growing out of this controversy, the supreme court of Wisconsin, in an elaborate opinion, has held the very statute to be valid which this court has thus emphatically held to be void.

That opinion, we understand, will be submitted as the argument for the appellant in this case; and on examination it will be found, we think, to be one of the most remarkable opinions that has ever emanated from a judicial tribunal.

The chief justice who delivered that opinion admits that this court has decided the statute in question to be unconstitutional and void, but proceeds to argue that it was not necessary for this court to so decide, and that hence its decision on that point is of no authority.

That it was only necessary for this court to have held the agreement not to remove a suit, to be void, and then argues that such agreement might be void, but the statute which required it to be made might still be valid. It seems hardly worth while to spend time in attempting to answer such subtle and fanciful reasoning as this.

Chief Justice Ryan starts out on this question with a statement which is hardly warranted by the facts; he says:

"The statute of the state does not assume to prohibit insurance companies taking license under it from removing actions on its policies from state to federal courts."

Sec. 3, chapter 64, Laws of 1872, *supra*, provides:

"If any insurance company shall make application to remove any case from the state into the United States circuit or district court, or federal court, contrary to the provisions of said chapter 56, or contrary to any agreement which such company may have filed in pursuance of said chapter 56, it shall be liable to a penalty of not less than one hundred dollars, and not

more than five hundred dollars, for each application so made," etc.

This would seem, at all events, to be an attempt to prohibit the removal of suits from the state to the federal courts, and it is a part of the very act which imposes the other penalty of forfeiture of license, — under which the Secretary of State was attempting to proceed to inflict the penalty of forfeiture of the license, when he was restrained by the injunction issued in this cause.

Although the Chief Justice of the state has a very high opinion of the ethical merits of these statutes requiring insurance companies to make unlawful agreements and denouncing upon them the pains and penalties prescribed in case of their violation, there can be no doubt, we think, that they are as bad in morals, as they have been held by this court to be in law.

They are simply *black-mailing* statutes, passed for the purpose of compelling insurance companies to submit their cases to prejudiced courts and juries, and their direct object and tendency is to subject insurance companies to that worst of all oppression, judicial injustice and wrong. The Chief Justice, who delivered the opinion, seems to have had as perverted views of the principles which govern in the forum of conscience as of those which prevail in courts of law.

So also the statement contained in the fifth paragraph of the opinion is equally unfounded. After the decision of this court in Ins. Co. v. Morse was published and became generally known, it was regarded by almost everybody as abrogating all statutes of the state having for their object a prohibition of the removal of suits from the state to the federal courts, and they were regarded as substantially repealed. The supreme court of the state of Ohio so held in—

Passenger Railway Ins. Co. v. Pierce, decided September, 1876, unreported, but published in The Insurance Law Journal for September, 1876, page 696.

The action was brought on a policy of insurance, in state court. The defendant filed a petition to remove it into the U. S. circuit court for the Northern District of Ohio. To the petition the plaintiff answered, denying the right of removal as prayed for, by

reason that the defendant below had waived its right as such foreign corporation so to remove the case, by filing in the office of the auditor of the state of Ohio, on 3d of March, 1869, its waiver and relinquishment of such right, pursuant to the statute of the state of Ohio in such case made and provided. On the hearing of the petition the court below found that a waiver of the right to remove the case had been duly executed and filed as averred in the answer to the petition, and for that reason alone denied the prayer of the petition.

The case was taken to the supreme court of the state, and that court, by SCOTT, C. J., say: "The decision of this case depends upon a single question. Is a statute of Ohio which requires a foreign insurance company, as a condition precedent to its right to carry on business within the state, to waive all claim or right to transfer or remove any cause then or thereafter pending in any of the courts of this state, wherein any such company may be a party, to any of the courts of the United States, repugnant to the constitution and laws of the United States and therefore void? If such statutory requirement be valid, the judgment of the court of common pleas in this case should be affirmed, otherwise it was without jurisdiction and must be reversed. The validity of such a state legislation was affirmed by the supreme court of this state, in the case of New York Life Insurance Company against Best *et al.*, 23 Ohio St. R., 105. A majority of this court fully approved that decision.

We think it based upon well established principles and reasons which cannot be successfully controverted. It is unnecessary to restate them. But the supreme court of the United States has recently decided the question otherwise, Chief Justice Waite and Judge Davis dissenting. Home Insurance Company *v.* Morse, 20 Wall., 445. * * Yet it would be practically useless to adhere to our convictions unless there were reasons to expect that the question when again presented to the court would be decided differently. We think it advisable, therefore, to follow, though we do not approve, the decision of the supreme court of the United States to which we have referred. The judgment will therefore be reversed."

It will be observed that there is not an intimation by the court that there is any distinction between the validity of the agreement or waiver, executed by the company, and the statute which requires such an agreement or waiver to be executed as a condition precedent to the right of the company to do business in the state. But the court treat the case as turning wholly upon the question whether the statute itself is valid, and that indeed is all there is involved in that case or in the case at bar. If the statute is valid the agreement or waiver is valid. If the statute is void the agreement or waiver is void. No reasoning can make the question any plainer than a simple statement of it —

The attempt to infer from the nonaction of the legislature a legislative intent to exclude companies from doing business in the state who had exercised the right of removal, is an illustration of how hardly the state court was pressed to find reasons to justify the holding of these statutes to be valid.

The second question as to the jurisdiction of the circuit court to restrain the secretary of state from revoking the license has been fully settled by this court in—

Osborn v. Bank, 9 Wheat., 738.
Dodge v. Woolsey, 18 How., 331.
Davis v. Gray, 16 Wall., 203.
Piek et al. v. R. R. Com'rs and Att'y Gen'l, in the U. S. circuit court, western district of Wisconsin, before Davis, Drummond and Hopkins, and pending on appeal here.

The principles decided in Osborn *v.* Bank, and which are affirmed by this court in Davis *v.* Gray, *supra*, are stated by Justice SWAYNE, who delivered the opinion in the latter case, 16 Wall., p. 220, as follows:

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants."

"In Osborn *v.* The Bank of the United States, 9 [illegible]738, three things, among others, were decided:"

"1. A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution, or a statute of the United States,

when such execution will violate the rights of the complainant.

"2. Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officer of the state in all respects as if the state were a party to the record.

"3. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

"Dodge *v.* Woolsey, 18 How., 331; The State Bank of Ohio *v.* Knoop, 16 id., 369; The Jefferson Branch Bank *v.* Skelly, 1 Black, 436; Ohio Life and Trust Co. *v.* Debolt, 16 How., 432, andThe Mechanics & Traders' Bank *v.* Debolt, 18 id., 380, proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant."

The Secretary does not act as Commissioner of Insurance by virtue of any provision of the state constitution, nor as Secretary of State. The duties and authority as Commissioner of Insurance, which are imposed and conferred on the Secretary of State, are wholly separate and distinct from his duties as Secretary of State, and are, as held by the state court, purely ministerial in their character. They are purely statutory duties and powers, and might as well have been conferred upon any other state officer, or on any person not a state officer, as on the Secretary of State.

The doctrine is too well settled in this court, by the decisions above cited, that the federal courts may restrain an agent of the state from doing an unlawful ministerial act, to the prejudice of the rights and property of others, to be now questioned.

WM. ALLEN BUTLER,
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